IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-81

RICHARD NIXON,

Petitioner,

v.

RONALD V. DELLUMS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix E, pp. 9a-26a, *infra*) is reported at ____ F.2d ____. The opinion of Judge MacKinnon, concurring in part and dissenting in part, (Appendix F, pp. 27a-29a, *infra*) is reported at ____ F.2d ____. The supplemental opinion of the Court of Appeals issued following petitioner's petition for rehearing (Appendix C, pp. 4a-6a, *infra*) is reported at

____ F.2d ____. The opinion of the District Court (per Judge Bryant) (Appendix H, pp. 32a-37a, *infra*) is not reported.

JURISDICTION

The judgment of the Court of Appeals was filed on January 28, 1977. A timely petition for rehearing was granted in part and denied in part on April 14, 1977 (Appendix C, pp. 4a-5a, *infra*), and a supplemental opinion was entered the same day (Appendix C, p. 6a, *infra*). Also on April 14, 1977, the court denied the suggestion for rehearing *en banc*, with Judges Tamm, MacKinnon and Robb voting to rehear the case *en banc* (Appendix D, pp. 7a-8a, *infra*). On April 29, 1977, the Court of Appeals granted petitioner's motion for a stay pending the filing of a petition for a writ of certiorari (Appendix B, pp. 2a-3a, *infra*), and a further extension was granted on May 20, 1977 (Appendix A, pp. 1a-2a, *infra*).

QUESTIONS PRESENTED

1. Whether the constitutionally-based presidential privilege of confidentiality bars compulsory disclosure of a President's communications for purposes of discovery in civil litigation.

2. Whether the respondents, who seek damages for arrests ordered by the Speaker of the House of Representatives and carried out by the District of Columbia and Capitol Police forces, have made a sufficiently compelling showing of particularized need to require disclosure of *all* presidential conversations during a 25 day period concerning the May Day demonstrations of 1971.

3. Whether the District Court and Court of Appeals erred in failing to accord the confidentiality privilege asserted by a former President the weight to which it is entitled under this Court's decision last term in *Nixon v. Administrator, et al.*

STATEMENT

In 1971, Congressman Ronald Dellums and nine other persons filed a class action on behalf of approximately 1,200 persons arrested on May 5, 1971 on the steps of the United States Capitol. They sought damages for alleged injuries to their civil rights stemming from arrests carried out by the District of Columbia and Capitol Police forces pursuant to instructions from former Speaker of the House, Carl Albert. The defendants included the District of Columbia, two former Chiefs of the Capitol and Metropolitan Police forces and former Attorneys General Richard Kleindeinst and John Mitchell. Neither petitioner Nixon nor any White House staff member was named as a defendant.

During the course of discovery, the respondents served a subpoena *duces tecum* on the Counsel to President Ford, Philip W. Buchen, who at the time had possession of petitioner's tape recorded conversations. The subpoena called for production at a deposition of all tapes and transcripts of White House conversations from April 16 through May 10, 1971 at which the "May Day" demonstrations were discussed. (The subpoena is reproduced as Appendix G, pp. 30a-31a, *infra*.) The respondents contended that they were arrested as the result of a conspiracy among the defendants and others to suppress lawful dissent, that President Nixon *likely* discussed the "May Day" demonstrations, that such conversations *probably* were recorded, and that respondents have the

right to have access to them in connection with their civil suit.

President Ford's Counsel moved to quash the subpoena on grounds that petitioner was the lawful custodian of the recordings and that the subpoenaed items were not relevant to respondents' case. On November 14, 1974, the District Court (Bryant, J.) denied Mr. Buchen's motion to quash and ordered him to produce, within five days, the tapes of any conversations in which the May Day demonstrations were discussed and in which any one of five named individuals participated during the more limited period of May 1 to May 5, 1971.[1]

Subsequently, President Ford's Counsel sought, and was granted, additional time to comply with the order. At that point, petitioner's counsel first learned of the subpoena and production order. The following day petitioner filed a motion for a stay and a motion to quash the subpoena, asserting that the subpoenaed conversations are subject to the presidential privilege of confidentiality recognized in *United States v. Nixon*, 418 U.S. 683 (1974), and are not subject to discovery in a civil case.

On December 2, 1974, Judge Bryant stayed the original production order but did not rule on petitioner's motion to quash. The same day, Judge Bryant granted a severance as to defendant Mitchell (App. H, p. 33a). The principal trial then proceeded without further material reference to the subpoena. The trial resulted in a damage award of approximately twelve

[1] Judge Bryant stated that respondents could renew their broader request covering 25 days if examination of the tapes indicated that periods not covered by the court's order might contain relevant evidence.

million dollars against the District of Columbia, and the former Chiefs of the Capitol and Metropolitan Police forces.[2] (That judgment is currently the subject of several consolidated appeals pending in the Court of Appeals. *Dellums, et al. v. Powell, et al.*, Nos. 75-1974, 75-1975, 75-2117.)

Approximately one year later, the respondents began preparation for the trial against defendant Mitchell and, in that connection, renewed their request for production of the subpoenaed tape recordings. Judge Bryant, on March 10, 1976, issued an order vacating the earlier stay, denying petitioner's motion to quash, and directing Mr. Buchen to advise the Court as to the time required for compliance with the subpoena (App. G, p. 37a). Petitioner requested the District Court to stay its order pending appeal, arguing that the government's search incident to compliance with the order would infringe petitioner's privacy rights under the Fourth Amendment. The motion was denied.

In denying the motion to quash, the District Court assumed *arguendo* that petitioner could assert the presidential privilege of confidentiality, but held that the privilege is merely "presumptive" in the context of civil litigation and that its assertion by a former President is entitled to lesser weight than if asserted by an incumbent President. The District Court also found that the privilege had been overcome by respondents' showing of need, and that petitioner's privacy rights would not be infringed by a search of the materials by President Ford's Counsel and his staff. Petitioner appealed the District Court's decision, and the Court of

[2] Defendant Kleindienst was granted a directed verdict because of the absence of evidence connecting him to the arrests at the Capitol (App. E, p. 11a).

Appeals stayed the District Court's order pending consideration of its validity.

On January 28, 1977, the Court of Appeals affirmed the District Court's order with respect to its ruling on the claim of presidential privilege. Citing this Court's decision in *United States v. Nixon, supra,* and a series of rulings by various lower courts, the court stated that the presidential privilege has been "consistently viewed as presumptive only" (App. E, p. 15a). Accordingly, it concluded that the privilege can be overcome by a showing of "litigating need" (App. E, p. 15a).

Like the District Court, the court below assumed *arguendo* that a former President has standing to assert a claim of confidentiality as to his own conversations while in office. The court held, however, that "the significance of the assertion by a former President is diminished" when the incumbent President does not join the claim (App. E, p. 19a). A former President's claim, the court stated, "has a cast of history – at first recent history, and ultimately mere history" (App. E, p. 19a). Accordingly, the court concluded that petitioner's assertion of the privilege was entitled to lesser weight and had been rebutted by the showing of need made by the respondents.

With regard to the respondents' claimed need for the materials, the court found that "[i]t is enough for present purposes that *it is highly likely* that such conversasions [concerning May Day demonstrations] did take place and were recorded, and there is a substantial possibility that Mr. Nixon discussed the matter with Mr. Mitchell, who was both his attorney general and a person who enjoyed a close working relationship with the President" (App. E, p. 21a), emphasis added). The court stated that "[g]iven the substantial violations of constitutional rights sought to be vindicated, given the high-level

meeting at the Justice Department to prepare for the May Day demonstration, the attendance of a White House aide and briefing of Mr. Mitchell as attorney general on these matters, [respondents] have made a showing of substantial need, in their attempt to establish Mr. Mitchell's responsibility for the violations" (App. E, p. 21a).

As to petitioner's claim that a government search of 25 days of his recorded conversations would violate his right of privacy, the court below stated that "the privacy interests of a former President must be safeguarded" (App. E, p. 24a). However, instead of adopting one of the alternatives suggested by petitioner for complying with the subpoena–suggestions which would have involved a less intrusive breach of petitioner's privacy–the court instructed the District Court to appoint a professional Government archivist as the court's special master to conduct the tape review. Any conversations relating to the May Day activities which the special master might find are to be transcribed, and the transcripts submitted to the court. (App. E, p. 25a).

Judge MacKinnon, concurring in part and dissenting in part, stated that "the majority opinion does not give full consideration to the true basis upon which the [presidential] privilege rests" (App. F, 27a). In his view, "[t]o assert that the privilege shall be interpreted so as to protect incumbent presidents more than former presidents is to inject considerations that are almost completely foreign to the intended purpose of the privilege and ignores the true reasons for the existence of the privilege" (App. F, p. 27a). Continuing, Judge MacKinnon stated that "[i]f the access to confidential advice

given to one President is to be subjected substantially to the post-hoc determination of his successor, the assurance of completely competent advice is likely to be lost entirely. The President to whom the advice was given should be in the best position to state whether the expectation of confidentiality enhanced the advice given to him when he was the incumbent in office" (App. 27a-28a).

On February 11, 1977, petitioner filed a petition for rehearing and a suggestion for rehearing *en banc.* The petition argued that the court's instruction to the District Court to appoint an archivist as special master interjected a new element into the case which had neither been briefed nor argued by the parties. Petitioner pointed out that he was at that moment engaged in litigation against the General Services Administration, of which the National Archives is a part, and that a Government archivist could not be presumed to be sufficiently disinterested to perform the judicial functions to be assigned the special master. In response, the court amended its earlier opinion, making such an appointment permissive, not mandatory. In all other respects, the court's decision was unaltered. On April 14, 1977, the suggestion for rehearing *en banc* was denied, with three members of the court voting to rehear the case.

REASONS FOR GRANTING THE WRIT

1. Three years ago, in *United States v. Nixon,* 418 U.S. 683 (1974), this Court confronted, for the first time, the question of whether a President's confidential discussions could be subjected to compulsory disclosure in the context of a criminal prosecution. In holding that disclosure was warranted, the Court repeatedly emphasized the narrow parameters of its decision. The Court specifically noted that the case was not "concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation . . ." 418 U.S. at 712, at n. 19.

Since that decision, numerous civil litigants have demanded disclosure of presidential documents and communications. Those demands have prompted several decisions by various lower courts concerning the precise issue reserved in *United States v. Nixon* for later determination. In one instance, a case involving the same May Day activities that are at the heart of this dispute, the district court ruled that a President's private communications are not subject to disclosure for purposes of civil discovery. *Apton v. Wilson,* No. 798-72 (D.D.C. 1974).

Other courts have decided to the contrary. *Sun Oil Co. v. United States,* 514 F.2d 1020 (Ct. Cl. 1975); *National Helium Corp. v. United States,* (Ct. Cl. No. 158-75); *Cities Service Helex, Inc. v. United States,* (Ct. Cl. No. 138-75); *Halperin, et al. v. Kissinger, et al.,* No. 1187-73 (D.D.C. 1976). Each court to do so, however, has first "questioned" whether a former President has standing to assert the confidentiality privilege, has asserted *arguendo* that he can, and then has proceeded to find that the privilege is nevertheless rebuttable and has been overcome by whatever showing of "need" the demanding party has managed to muster.

This continuing proliferation of civil litigation demands for disclosure of confidential deliberations of a President and the demonstrated willingness of various courts to find virtually any justification sufficient to order disclosure, necessitate this Court's review of the Court of Appeals' decision in this case.

2. In *United States v. Nixon, supra,* this Court stated that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." 418 U.S. at 708. The Court emphasized that confidentiality is "essential" to the President's functioning in the office. Accordingly, the Court held that a President's communications are protected by a privilege "inextricably rooted in the separation of powers" and stemming from "the supremacy of each branch of government within its own assigned area of constitutional duties." 418 U.S. at 705.

The asserted privilege in that case, however, was pitted against the need for relevant evidence in a criminal trial which, as the Court pointed out, has its own constitutional dimensions in view of the Sixth Amendment guarantees of compulsory process and confrontation of witnesses, and the Fifth Amendment bar against deprivation of liberties without due process of law. In striking the balance between these constitutionally–based interests, the Court was

persuaded that each could be accommodated if the confidentiality privilege could be overcome only upon a "compelling showing" of "particularized need" for "relevant and admissible" evidence in a criminal trial. The touchstone for this result was the Court's view that presidential advisers will not be moved "to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712.

The Court seemed to doubt whether this would hold true in other contexts, for at that precise point in its opinion, the Court disclaimed, by footnote, any connection between that decision and the future resolution of demands for presidential materials in civil litigation. 418 U.S. at 712, n. 19. The Court's apparent concern in that regard was well justified because subsequent events have demonstrated that the frequency of such demands are limited only by the ingenuity of creative counsel.

In *Sun Oil Co. v. United States,* 514 F.2d 1020 (Ct. Cl. 1975), for example, the plaintiff oil companies, complaining of an allegedly improper denial of a drilling platform permit, demanded access to four memoranda containing recommendations to President Nixon. The Court of Claims held that the oil companies were entitled to the confidential memoranda because they "might well lead to the discovery of admissible evidence." 514 F.2d at 1025.

In another case, a trial commissioner of the Court of Claims ordered a government search of *all presidential materials* pertaining to the preparation of the budget in each year of Mr. Nixon's Presidency so that various companies complaining of alleged breaches of their helium conservation contracts could learn the President's motiva-

tions and the budget considerations that may have led to the termination of their agreements. *National Helium Corp. v. United States,* (Ct. Cl. No. 158-75); *Cities Service Helex, Inc. v. United States,* (Ct. Cl. No. 138-75), appeal pending (Ct. Cl. Nos. 158-75, 138-75).

Most recently, a judge of the United States Customs Court ordered the government to search all of petitioner's presidential materials in order to determine if any pertain to the plaintiff tire company's contention that it was subjected to countervailing import duties by the Treasury Department because of contributions made by domestic tire manufacturers to the Committee to Reelect the President. *Michelin Tire Corp. v. United States,* Customs Ct. No. 75-9-02467.

These are but three of the numerous civil suits in which parties have demanded, or stand ready to demand, access to presidential files. And the willingness of various judges to accommodate those demands upon gossamer-thin assertions of need is amply evidenced by this appeal. First, the respondents' subpoena did not even approach the degree of specificity this Court demanded of the Special Prosecutor in *United States v. Nixon.* The Special Prosecutor pinpointed sixty-four specific conversations preliminarily shown to be relevant to the criminal trial. Here, the subpoena indiscriminately blanketed twenty-five days of recordings with no showing that any conversations relevant to respondents' case in fact took place. In the Court of Appeals' view, however, the particularized demand requirement was satisfied because, in the court's estimation, it is "highly likely" such conversations occurred. Second, according to the court below, the stringent showing of need demanded by this Court in *United States v. Nixon,* was met simply by "the substantial violations of constitutional rights to be vindicated" (App. E, p. 21a).

Third, the court below completely misapplied the requirement in *United States v. Nixon* that the evidence sought must be "essential to the justice of the [pending] case." 418 U.S. at 713, quoting *United States v. Burr,* 25 F. Cas., at 192. The respondents' claims are based upon arrests that occurred at the Capitol: arrests made by the Capitol and Metropolitan police forces with the concurrence of then Speaker of the House, Carl Albert. Even if the subpoenaed materials evidenced the conspiracy respondents envision, it would avail them nothing. The respondents' need is for evidence tying the remaining defendant, John Mitchell, to the arrests at the Capitol, not to an alleged White House-Justice Department conspiracy that may have produced arrests in other parts of the city.

This case, and the others we have referred to earlier, illustrate that the confidentiality this Court said was "essential" to the President's performance of his duties cannot be left to the vagaries of a presumptive privilege that can be overridden whenever any district court or Customs Court judge, Court of Claims commissioner, or other federal or state judicial officer decides that disclosure is justified. Case-by-case determinations of that kind will create a degree of uncertainty concerning the possibility of future disclosure sufficient to frustrate the purpose of the privilege. If a President and his advisers discussing the proper course for handling threats of violent demonstrations must concern themselves with whether a district court judge four years later may determine that the presumption of confidentiality has been rebutted, their communications must – no matter how innocent – be tailored for future public consumption. We submit that was not the course of events envisioned by the Court in *United*

States v. Nixon, but it is inevitable under the Court of Appeals' decision in this case.

3. We believe the purposes of the confidentiality privilege necessitate that a President's private deliberations not be subject to compulsory disclosure pursuant to demands of civil litigants. However, even if this Court were to conclude that the privilege of confidentiality is only presumptive in civil cases, both the District Court and the Court of Appeals applied an erroneous standard for rebutting the presumption. Both concluded that petitioner's assertion of the privilege was entitled to lesser weight because he no longer is in office. The Court of Appeals viewed this fact as being of "cardinal significance" (App. E, p. 17a), and even noted that if President Carter should decide, upon remand, not to remain silent on the question as did President Ford, that would be a basis for reconsideration by the District Court" (App. E, p. 14a).

Since the Court of Appeals' decision, this Court has issued its opinion in *Nixon v. Administrator, et al.,* in which it discussed the significance of the privilege as asserted by a former President. Rejecting the argument that a former President is without standing to claim the privilege, the Court adopted the position stated by the Solicitor General:

> " 'This Court held in *United States v. Nixon,* [418 U.S. 683 (1974)] that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.' " 45 L.W. 4917, at 4923, quoting Brief for Federal Appellees, at 33.

A standard of confidentiality that "cannot be measured by [a] few months or years" is clearly at odds with the Court of Appeals' "lesser weight" analysis under which the failure of the incumbent to join the former President's assertion looms as of "cardinal significance." Thus the Court of Appeals was in error in this regard.

4. There are three principal contexts in which the question arises as to whether a President's confidential deliberations can be subjected to compulsory disclosure: demands for evidence by grand juries and in criminal trials, demands for discovery and evidence in civil actions, and demands by Congress. In *United States v. Nixon,* this Court decided the issue in the context that is least likely to arise with any significant degree of frequency. This appeal raises the question with respect to civil demands, which the record shows will undoubtedly arise with greater frequency and therefore constitute a more significant threat to the confidentiality essential to the President's performance of his duties in office. We believe the Court should take this opportunity to provide guidance on this issue to the several courts that currently, and the various courts that will in the near future, confront demands by civil litigants for access to a President's confidential deliberations. [3]

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[3] At minimum, because of the failure of the court below to accord petitioner's assertion of the privilege the weight to which it was entitled, it is appropriate for this Court to grant the petition for certiorari and to remand the case for reconsideration in light of this Court's statements in *Nixon v. Administrator, et al.* concerning assertions of the privilege by former Presidents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil Action 2271-71

No. 76-1336

Honorable Ronald V. Dellums, et al.

v.

James M. Powell, Chief
U.S. Capitol Police, et al.,

Richard Nixon,
Appellant

In re: Subpoena to compel disclosure of recorded presidential conversations

BEFORE: Leventhal, Robinson and MacKinnon, Circuit Judges

ORDER

Upon consideration of appellant's unopposed motion for extension of stay of mandate, and it appearing that by order dated April 29, 1977, this Court previously stayed the issuance of the mandate in this case through and including May 22, 1977, it is

ORDERED by the Court that appellant's motion is granted, and the Clerk is directed not to issue the mandate in this case until at least thirty days after the decision of the Supreme Court of the United States in *Nixon*

v. Administrator, or until July 13, 1977, whichever occurs first.

Per Curiam

For the Court:

[Filed May 20, 1977] GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil Action 2271-71

No. 76-1336

Hon. Ronald V. Dellums, et al.,

v.

James M. Powell, Chief,
U.S. Capitol Police, et al.,

Richard Nixon,

Appellant,

In re: Subpoena to compel disclosure of recorded presidential conversations

BEFORE: Leventhal, Robinson and MacKinnon, Circuit Judges

ORDER

Upon consideration of appellant's unopposed motion for stay of mandate, it is

ORDERED by the Court that appellant's motion for stay of mandate is granted, and the Clerk is directed not to issue the mandate in this case prior to May 23, 1977.

Per Curiam

For the Court:

[Filed April 29, 1977] GEORGE A. FISHER
Clerk

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1336

HON. RONALD V. DELLUMS, ET AL.

v.

JAMES M. POWELL, Chief, U.S. Capitol Police, ET AL.

RICHARD NIXON, APPELLANT

In re: Subpoena to compel disclosure of recorded presidential conversations

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On Appellant's Petition for Rehearing

(D.C. Civil 2271-71)

Argued April 27, 1976

Filed April 14, 1977

Judgment ... this date

Before: LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges*

2

ORDER

Upon consideration of the petition for rehearing filed herein by appellant Richard Nixon, it is

ORDERED, by the Court, that appellant's aforesaid petition is granted to the extent indicated in the Supplemental Opinion filed herein on this date; in all other respects said petition is denied.

Per Curiam

3 SUPPLEMENTAL OPINION

Appellant Richard Nixon has filed a petition for rehearing which for the most part repeats arguments already made and rejected. One aspect merits a further word, and that is the objection to that part of this court's opinion that states that the District Court should appoint a professional Government archivist as a "master". We developed this in view of appellant's objection to screening by the counselor to the President. In the petition filed February 11, appellant asserts that he has objections to our alternative—he complains of a conflict of interest because of other litigation pending with GSA, and lack of pertinent expertise. Appellant asserts that he would even prefer screening by the counselor to the President. We do not probe these matters. We will revise our opinion to change "should" to "may", to make it clear that the procedure we have outlined is permissive, not mandatory. If appellant's contentions have merit, the district court can make other arrangements, including reference to the successor to the counsel to the President. In the sound exercise of discretion, after considering suggestions by the parties, the district court may appoint another master. To the extent indicated, the petition for rehearing is granted; otherwise it is denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil Action 2271-71

No. 76-1336

Honorable Ronald V. Dellums, et al.

v.

James M. Powell, Chief,
U.S. Capitol Police, et al.,

Richard Nixon,

Appellant

In re: Subpoena to compel disclosure of recorded presidential conversations

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

On consideration of the suggestion for rehearing *en banc* of appellant Richard Nixon, and a majority of the Judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
George A. Fisher
Clerk

[Filed April 14, 1977]

Circuit Judges Tamm, MacKinnon and Robb would grant appellant's suggestion for rehearing *en banc*.

APPENDIX E

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1336

HONORABLE RONALD V. DELLUMS, ET AL.

v.

JAMES M. POWELL, CHIEF, U. S. CAPITOL POLICE, ET AL.
RICHARD NIXON, APPELLANT

IN RE: SUBPOENA TO COMPEL DISCLOSURE OF RECORDED PRESIDENTIAL CONVERSATIONS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 2271-71)

Argued April 27, 1976

Decided January 28, 1977

R. Stan Mortenson, with whom *Herbert J. Miller, Jr.* and *Raymond G. Larroca* were on the brief for appellant.

Warren K. Kaplan, with whom *Lawrence H. Mirel*, were on the brief for appellees.

David J. Anderson, with whom *Rex. E. Lee*, Assistant Attorney General and *Irwin Goldbloom*, Deputy Assistant Attorney General, were on the brief for appellee Buchen.

Before: LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: This appeal concerns the validity of an order of the District Court for the District of Columbia (Judge William Bryant) denying the motion of appellant, former President Richard M. Nixon, to quash a subpoena *duces tecum* served on Philip Buchen, Counsel to President Ford by plaintiffs-appellees.[1] The challenged subpoena demands production of "all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971, at which 'May Day' demonstrations . . . were discussed." App. 25a. Plaintiffs seek this material in connection with their civil action in District Court for damages ascribed to alleged violations of their constitutional rights.[2] The underlying facts refer to the arrest of plaintiffs and their class on the grounds of the Capitol on May 5, 1971, and their subsequent detention, during the "May Day" demonstrations held to protest American military involvement in Southeast Asia.[3] The class action has already gone to trial as against all defendants other than former Attorney General John Mitchell, and the judgment of the District Court (also Judge Bryant) awarding damages to plaintiffs has been appealed.[4] The challenged subpoena is presently designed to obtain information for use only in the action remaining against Mr. Mitchell, whose case was severed on his motion.

The subpoena was originally served by plaintiffs in October, 1974. Mr. Buchen, the person who has actual physical control over Mr. Nixon's "White House tapes," [5]

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[1] The named plaintiffs-appellees, representing themselves and a class of approximately 1,200 individuals, are Congressman Ronald V. Dellums, Bruce Aldrich, Edward J. Cannon, Frederick J. Deterle, Janis L. McDonald, LaDuska Monaco, David L. Preiss, Gary M. Regan, Michael J. Roche, and Dorothy Strong.

[2] Plaintiffs-appellees essentially charged that defendants deprived them of liberty without due process of law in violation of the Fifth Amendment, and infringed their rights to freedom of assembly, freedom of speech and freedom to petition the government for redress of grievances in violation of the First Amendment. Brief of Appellees at 26.

[3] The factual setting of the May Day demonstrations is set forth in *Sullivan* v. *Murphy*, 156 U.S.App.D.C. 28, 478 F.2d 938, *cert. denied*, 414 U.S. 880 (1973).

[4] Mr. Mitchell was originally made a codefendant with the District of Columbia, the former Chief of the Capitol Police, the former Chief of the Metropolitan Police Department, and Mr. Richard Kleindienst. Mr. Mitchell was granted a severance on December 2, 1974, because of his involvement with other judicial proceedings. The remaining defendants went to trial and plaintiffs were awarded damages of twelve million dollars from the District of Columbia and the two former police chiefs; Mr. Kleindienst was granted a directed verdict because of insufficient evidence. Those judgments are currently on appeal before this Court. *Dellums, et al.* v. *Powell, et al.*, Nos. 75-1974, 75-1975, and 75-2117. Mr. Nixon has never been a defendant in the suit.

[5] This claim was based on the fact that Mr. Nixon's Presidential materials were at that time the subject of a depository Agreement—the so-called Nixon-Sampson Agreement—under which Mr. Nixon was recognized as the lawful custodian. That agreement has since been superceded by the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526 (Dec. 19, 1974), 88 Stat. 1695, 44 U.S.C.A. §§ 2107 note, 3315-24 (Supp. I, Feb. 1975), which has recently been upheld as constitutional, *Richard M. Nixon v. Administrator of General Services, et al.*, 408 F.Supp. 321 (D.D.C. 1976) (three-judge court), *prob. juris. noted*, 45 U.S.L.W. 3394 (U.S. Nov. 29, 1976).

filed a motion to quash the subpoena on the ground that he was not the custodian of the tapes, and alternatively that the material sought was not relevant to the case. The District Court denied Mr. Buchen's motion on November 14, 1974, and ordered him to produce the subpoenaed material. Shortly thereafter, counsel for Mr. Nixon learned of the production order and immediately filed a motion for stay of the November 14 order. He also filed his own motion to quash the subpoena, in which he asserted that the materials sought in the subpoena were subject to the presidential privilege of confidentiality recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), and that this privilege was absolute in the context of civil litigation. On December 2, 1974, the same date the District Court ordered severance as to Mr. Mitchell, it granted Mr. Nixon's motion for stay, without ruling on his motion to quash.[6] The action against all but Mr. Mitchell proceeded to judgment without further material reference to the subpoena.

The subpoena thereafter remained in limbo until plaintiffs began making preparation to proceed with their action against Mr. Mitchell. On February 17, 1976, they filed a supplemental memorandum in opposition to Mr. Nixon's motion to quash. He filed a responsive supplemental memorandum. The District Court, on March 10, 1976, issued a Memorandum and Order denying the motion to quash, vacating the stay order of December 2, 1974, and directing Mr. Buchen to advise the Court of the time necessary for compliance with the subpoena.

[6] The motion for stay was granted "[b]ecause of the pendency of the trial and the prospect that lengthy litigation would be necessary to enforce the subpoena of the tapes * * *." App. 15-A. The suit against Mr. Mitchell was severed on the same date.

This court has stayed the District Court's order pending consideration of its validity.[7]

In denying this motion to quash, the District Court assumed *arguendo* that a former President could assert a presidential privilege based on a generalized interest in confidentiality, but held that it was not an absolute privilege in the context of civil litigation and that it was entitled to a lesser weight than a claim of presidential privilege asserted by an incumbent President. The court found that the privilege had been overcome in this case, and that Mr. Nixon's Fourth Amendment privacy rights would not be infringed by a search of the materials by Mr. Buchen.

These holdings are vigorously challenged on appeal. Mr. Nixon asserts that the privilege must be absolute when asserted in civil litigation, and that a formal claim of privilege is entitled to the same weight whether asserted by a former or an incumbent President. He additionally urges that the District Court erred in holding that his privacy claim was frivolous.

We reverse the District Court, in part, and remand the case with instructions intended to give further protection to Mr. Nixon's interest in the privacy of his personal documents and communications. As to the claim of presidential privilege, however, with the interest of personal privacy put to one side, we affirm the District Court's ruling. That ruling was based on the inaction of Gerald Ford, President when the District Court made its

[7] After its denial of the motion to quash the District Court denied a motion for stay pending appeal. Mr. Nixon immediately appealed and filed a motion for stay. This Court granted an "administrative stay" so that it could more fully consider the matter on oral argument of the motion. At oral argument, the parties agreed to submit the case on the merits and to file briefs subsequent to the argument. The stay has remained in effect pending further order of the court.

ruling, and when this opinion was sent to press. If a different approach by Jimmy Carter, as President, should develop, this would be a basis for counsel to seek reconsideration by the District Court.

I.

This case does not require us to rule on the issue of law whether a former President has the requisite interest to assert a presidential confidentiality privilege.[a] Assuming *arguendo* a former President may present a claim of presidential privilege, we agree with the District Court both that it is entitled to lesser weight than that assigned the privilege asserted by an incumbent President, and that it has been overcome in the present case by plaintiffs' showing.

We begin our discussion by rejecting Mr. Nixon's contention that a formal claim of privilege based on the generalized interest of presidential confidentiality, without more, works an absolute bar to discovery of presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought. It is the province and duty of the judiciary "to say what the law is" with respect to the claim of privilege in a particular case, even when the claim is one of presidential privilege. *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *United States v. Nixon*, 418 U.S. 683, 705 (1974). The privilege asserted in the case at bar is not premised on a claim of a need to protect national

[a] We attach no significance to the distinction appellant attempts to draw between a claim of "executive privilege" and one of "presidential privilege." Appellant asserts that the former refers to the privilege relating to the protection of secret information involving military and foreign affairs and national security, while the latter refers covers the interest in safeguarding the confidentiality of confidential communications unrelated to subject matter. Such semantic distinctions are not significant, nor are they relevant.

security, military or diplomatic secrets;[b] it is, rather, premised on the needs of present and future Presidents to maintain the confidentiality of communications with their advisors in order to encourage the candid advice necessary for effective decisionmaking. The privilege rooted in confidential communications with the President is constitutionally based, and entitled to great weight, *United States v. Nixon, supra*, but it has been consistently viewed as presumptive only. *See, e.g., Id.* at 708; *Senate Select Committee v. Nixon*, 162 U.S.App.D.C. 183, 188, 498 F.2d 725, 730 (D.C.Cir. 1974) (en banc); *Nixon v. Sirica*, 159 U.S.App.D.C. 58, 75, 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 149 U.S.App.D.C. 385, 463 F.2d 788, *cert. denied*, 404 U.S. 917 (1971); *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct.Cl. 1975); *Nixon v. Administrator of General Services, et al.*, 408 F. Supp. 321 (D.D.C. 1976) (three judge court), *prob. juris. noted*, 45 U.S.L.W. 3394 (Nov. 29, 1976); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd* 128 U.S.App.D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967). The various decisions considering the privilege reflect a balancing approach, weighing "the detrimental effects of disclosure against the necessity for production shown," *Carl Zeiss Stiftung, supra*, 40 F.R.D. at 327. In Judge McGowan's phrase, there is a "need for particularized analysis rather than [the] mechanistic formalism" inherent in a claim of executive absolutism. *Nixon v. Administrator, supra*, 408 F. Supp. at 342; *see also Nixon v. Sirica, supra*, 487 F.2d at 715.

The question before us was left open in *United States v. Nixon*, for in that case, as the Court noted, it had no occasion to consider the "need for relevant evidence in

[b] *See United States v. Reynolds*, 345 U.S. 1 (1953).

civil litigation." [10] Mr. Nixon argued that the recognition for civil litigation of a presidential privilege that is not conclusive, but only "presumptive," would effectively destroy the privilege. It is urged that recognition of a rebuttable presumption would open the floodgates: those on whom a President relies for advice would be foolish indeed to discuss the demands of executive decisionmaking with candor, when every proposal would be subject to public disclosure through civil discovery.

An advisor to the President has no guarantee of confidentiality. His advice may be disclosed by the President [11] or a successor. As to disclosure by a court, the need for confidentiality is in large measure secured and protected by the relatively infrequent occasions when an assertion of the privilege may be overcome.[12] And so it is, and should be, that the "presumptive" privilege em-

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[10] In *United States v. Nixon, supra,* 418 U.S. at 712, n. 19, the Court noted:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

[11] *See, e.g.,* 10 Weekly Comp. of Pres. Docs. 449-450-58 (May 6, 1974).

[12] The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

United States v. Nixon, supra, 418 U.S. at 712.

bodies a strong presumption, and not merely a lip-service reference.

Appellant's counsel stresses that in the 1974 *Nixon* case the court referred to the constitutional demands of the criminal justice system as identifying a need for disclosure. That is so. But there is also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment. *Cf. Apton v. Wilson,* 165 U.S.App.D.C. 22, 506 F.2d 83 (D.C.Cir. 1974). The possibility of disclosure in such instances is not unlike the possibility of disclosure in criminal cases—the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled.

It is of cardinal significance, in the controversy now before this court, that the claim of privilege is being urged solely by a former president, and there has been no assertion of privilege by an incumbent president, whose appearance had a distinctly different stance.[13] Absence of support from the incumbent at least indicates, that "the risk of impairing necessary confidentiality is attenuated." *Nixon v. Administrator, supra,* 408 F. Supp. at 344. The language of the 1974 *Nixon* opinion suggests an underlying assumption of a sitting rather than a former president, as witness the reference to the need for "according

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[13] When the Counsel to President Ford attempted to quash the subpoena no claim of privilege was asserted. Rather, he claimed that the subpoena should not be directed to him, and alternatively urged simply that the requested materials were *not relevant* to the litigation.

high respect to the representations made on behalf of the President" (418 U.S. at 707), and the quotation from Chief Justice Marshall's opinion in *Burr*, that "in no case of this kind would a court be required to proceed against the president as against an ordinary individual." We concur in the analysis of Judge McGowan, in *Nixon v. Administrator*, *supra*, 408 F.Supp. at 344-45:

> [E]ven assuming *arguendo* that Mr. Nixon may, as a former President, assert executive privilege, such a claim is not as forceful as one raised by an incumbent. All of the reasons militating against permitting a former President to assert privilege without the support of the incumbent suggests, at the least, that if he is to be allowed to do so, such a claim carries much less weight than a claim asserted by the incumbent himself.[14]

To aid analysis of presidential privilege, any interests of personal privacy may be put to one side, although their presence is the occasion for providing some additional protection in the screening procedure, as appears in part III of our opinion. On a transfer of information and documents material to the carrying on of presidential functions, it is the new President who has the information and attendant duty of executing the laws in the light of current facts and circumstances, and who has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed, when in his opinion the need of maintaining confidentiality in communications, in which of course it is he who has the on-going interest, outweighs whatever public interest or need may reside in disclosure. There

[14] The reasons "militating against" a former President being allowed to assert the privilege relate principally to the fact that the privilege is seen as inhering in the institution of the Presidency, and not in the President personally. The reasons are extensively discussed in *Nixon v. Administrator*, *supra*, 408 F.Supp. at 343-45.

is a presumptive privilege that attaches to the communications, submissions and deliberations essential to the conduct of the office of the president. Obviously, the privilege does not disappear merely because the president who made or received the communication dies, resigns, or has completed his term. The question is, by whom must the privilege be claimed. Analytically, there is much to be said for the proposition that the state secret privilege must be claimed by some official authorized to speak for the state (the government), and the presidential privilege must be claimed by the president or an official authorized to speak for the president. As already noted, however, it is not necessary for us to decide that issue in this case. Assuming it may be asserted by someone other than the sitting president, conceivably by the court itself, the *significance* of the assertion by a former president is diminished when the succeeding president does not assert that the document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation. The former president's assertion has a cast of history—at first recent history, and ultimately mere history—and his claim has less significance as an assertion of the current needs of the office. Such lesser significance does not open the door to public disclosure, but only to consideration whether the claim is overcome by a showing of other need, here litigating need.

II.

The District Court here found that plaintiffs-appellees had made a showing of need sufficient to overcome the claim of presidential privilege. This was not a rote, conclusory or perfunctory finding. The court presented the basis for its finding in a considered analysis:

> The Court believes plaintiffs have demonstrated a very strong entitlement to discovery of the tapes in question. Plaintiffs claim that a policy or plan was devised by the defendants in this case, including

defendant Mitchell, which led to and instigated the allegedly unlawful arrest and detention of plaintiff's on May 5, 1971. Other discovery has established that high-level meetings were held at the Justice Department to plan for the May Day demonstrations. Defendant Mitchell, according to deposition testimony, was briefed on these meetings. At least one top-level White House aide was present at each of these meetings after April 16, the initial date with which the subpoena is concerned. The almost certain inference must be that these aides reported to Nixon on the progress of their planning, and took his reactions and directions back to the Justice Department. It is quite possible, as plaintiffs suggest, especially given the close relationship between Nixon and Mitchell, that the two men discussed the matter either personally or by telephone. If so, the conversations will be among those subpoenaed. And whatever recorded conversations occurred in the White House with regard to the Administration's plans for dealing with the demonstrators could constitute the most direct and central sort of evidence for plaintiffs' case. The Court can scarcely imagine what could be more relevant to the grave allegations in the present case than the actual words of those alleged to have been the conspirators. Nor can the Court perceive any alternative means by which plaintiffs could obtain comparable discovery. They have had considerable difficulty, in particular, in arranging to depose Mitchell, and even should they do so the results are bound to be far inferior to the actual contemporaneous record of the planning for the demonstrations. In short, the showing made by plaintiffs completely overcomes whatever presumptive executive privilege may attach to the former President's interest in the tapes. App. 18-A—19-A.

We affirm the District Court ruling. Concededly, plaintiffs-appellees have not established with absolute certainty that conversations concerning the demonstrations actually took place between Mr. Nixon and those with

whom he consulted during the time frame embraced by the subpoena. It is enough for present purposes that it is highly likely that such conversations did take place and were recorded, and there is a substantial possibility that Mr. Nixon dicussed the matter with Mr. Mitchell, who was both his attorney general and a person who enjoyed a close working relationship with the President. Only if such recorded conversations do exist, will plaintiffs have access to any record. If they do not exist, the assumed privilege will remain intact and there will be no public diclosure.

We are also in accord with the ruling of the District Court that plaintiffs-appellees established a specific need for the requested information sufficient to overcome the rebuttable presumption of privilege of a former President, assuming such a privilege exists. Their need is beyond the routine desire of every party to discover relevant information to assist in the preparation of a case. The District Judge was acting on the premise that the lengthy trial held before him as to the other defendants established that the Department of Justice played a leading role in the executive's efforts to cope with the May Day demonstrations, and that there had ensued substantial violations of fundamental constitutional rights on May 5, 1971. What had not yet been established was whether, or to what extent, former Attorney General Mitchell was involved in the particular constitutional violations of May 5, 1971. Given the substantial violations of constitutional rights sought to be vindicated, given the high-level meeting at the Justice Department to prepare for the May Day demonstration, the attendance of a White House aide and briefing of Mr. Mitchell as attorney general on these matters, plaintiffs have made a showing of substantial need, in their attempt to establish Mr. Mitchell's responsibility for the violations, for overcoming the presumption of the privilege assumed

to exist for former Presidents. *Cf. Sun Oil Co. v. United States, supra*, 514 F.2d at 1025.

In sum, plaintiffs-appellees have certainly made at least a "preliminary showing of necessity" [15] for information that is not merely "demonstrably relevant" [16] but indeed substantially material to their case.[17]

To obviate any misunderstanding, and in view of the importance of the considerations involved, we add a word concerning protective orders, even though not specified in appellant's papers. Disclosure because of the potential needs of litigation need not be made to the public, and indeed in a case of this kind should be restricted to counsel, unless and until the documents are made part of the public trial record. *E.g.*, 4 J. Moore, *Moore's Federal Practice* ¶ 26.73-75 (1976). Former President Nixon would be entitled to a protective order, that before any documents are disclosed in a public proceeding or record there would be due and ample notice to Mr. Nixon, and an opportunity to litigate the issue of need for public disclosure, on a determination to be made in the light of the actual litigating posture of the case and the contents of the document(s). Our affirmance of the district court's order on this aspect of the case is to be taken as without prejudice to any request for or claim of right to a suitable protective order.

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[15] *Smith* v. *Schlesinger*, 168 U.S. App. D.C. 204, 219 & n. 52, 513 F.2d 462, 477 & n. 52 (1975).

[16] *United States* v. *Nixon, supra*, 418 U.S. at 712.

[17] *Compare Apton v. Wilson*, Civil No. 798-72 *and Kuhn* v. *Wilson*, Civil No. 956-71 (D.D.C. Order of March 26, 1975) (consolidated cases), where a claim of privilege was upheld to quash a subpoena *duces tecum* because "the information requested . . . [did] not go to the heart of the plaintiffs' case, and [was] of peripheral relevance at best." Order at 2.

III.

We find, however, that the District Court erred in failing to provide adequate protection for Mr. Nixon's personal privacy interests in the materials subpoenaed.

The court directed Counsel to the President to review the designated tape recordings to determine if conversations pertaining to May Day demonstrations were included therein, and thereafter to turn over such recordings directly to counsel for plaintiffs. Mr. Nixon claims initially that the subpoena amounts to nothing more than a wide-ranging "fishing expedition" designed to disclose to the public conversations covering 25 days. If the subpoena is read, as it is capable of being read if taken literally, as requiring an entire tape to be produced if any portion of it relates to the May Day demonstrations, plaintiffs would be entitled to discover all conversations recorded on such a day, including those of an intensely personal nature—some of which would be subject to an independent common law privilege. At oral argument plaintiffs disclaimed any interest in such materials. The District Court's memorandum opinion indicates an intention to limit discovery to those portions of the recordings dealing with the demonstrations, but the accompanying order denying the motion to quash does not so explicitly limit the subpoena. While the memorandum opinion could fairly be interpreted as impliedly narrowing the apparently unintended scope of the subpoena, to avoid any possible misunderstanding we remand with direction to the District Court to make such a limitation explicit in its order.

In addition, Mr. Buchen's review of the recordings in compliance with the District Court order implicates Mr. Nixon's privacy rights in a manner not contemplated by the Presidential Recordings and Materials Preservation Act. An essential element of the Act is review of the

materials by a disinterested, professional archivist, and not by Counsel to an incumbent President, however conscientious he may be. Even under procedures of the Act, the invasion of Mr. Nixon's privacy is "not insignificant," *Nixon v. Administrator*, *supra*, 408 F.Supp. at 367.

Mr. Nixon has had his personal documents relating to his presidency subjected to the Presidential Recordings and Materials Preservation Act, an action found to be constitutional. *Nixon v. Administrator*, *supra*. While the three-judge court in *Nixon* enjoined the General Services Administration from "processing, disclosing, inspecting, transferring, or otherwise disposing of any materials" falling within the provisions of the Act pending Mr. Nixon's appeal to the Supreme Court, it specifically did not enjoin any review, inspection, or disclosure "of materials pursuant to any subpoena or other lawful process * * *." *Id.* at 375. In directing Mr. Buchen immediately to undertake review of the subpoenaed documents, the District Court rejected Mr. Nixon's privacy claims as frivolous. In our view, the privacy interests of a former President must be safeguarded.

Our resolution of the problem is a ruling that the District Court should appoint a professional Government archivist as a Special Master to the Court pursuant to Fed. R. Civ. P. 53(a) for the limited purpose of reviewing the designated tape recordings, transcribing those portions of conversations relating to the May Day activities and transmitting such isolated transcripts to the court.[18] At all times during the review, Mr. Nixon or

[18] Because of the injunction barring general review of the materials by an archivist, we assume that no formal mechanism has been established to carry out the specific review demanded when a subpoena for certain material issues. If one has been established, the District Court's order can mesh with that system.

his representative shall have an absolute and unqualified right to be present; however, the determination of what constitutes material in compliance with the subpoena shall be left with the Special Master. Following transmittal of relevant materials to the Court, and before they are to be turned over to counsel for plaintiffs, Mr. Nixon shall be afforded the right to assert "any rights, defenses, or privileges"—whatever they might be—in accordance with the appropriate implementing regulation of the Act. 41 C.F.R. § 105-63.303.[19]

Under such circumstances, we contemplate a procedure in the District Court identical to that outlined in this court's *en banc* opinion in *Nixon v. Sirica*, *supra*, 159 U.S.App.D.C. at 79, 487 F.2d at 721. While the parties are directed to that order, we think it sufficient to indicate that the procedure there developed contemplates *in camera* review of the challenged material at which time Mr. Nixon will be able to assert any claims of privilege with particularity. Counsel for plaintiffs will be entitled to inspect the materials in chambers to assist the Court in determining the validity of any claim of privilege. Any ruling adverse to Mr. Nixon is subject to appeal, if that course of action is deemed appropriate. *See*, *id.* at n.100.

* * *

[19] 41 C.F.R. § 105-63.303 provides:

In accordance with the provisions of Subpart 105-63.2, and subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, the Presidential historical materials in the custody and control of the Administrator of General Services will be made available for use in any judicial proceeding, and are subject to subpoena or other lawful process. Requests by the Special for access to the Presidential historical materials, whether by court subpoena or other lawful process, including access pursuant to § 105-63.302-1 shall at all times have priority over any other requests for the materials.

For the reasons stated above, the memorandum and order of the District Court is affirmed in part, reversed in part, and remanded for modification consistent with this opinion. Thereafter the subpoena may issue.

So ordered.

APPENDIX F

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: In my view the majority opinion does not give full consideration to the true basis upon which the privilege rests. The presidential privilege is not something that is completely personal, but is something that adheres to the *office* of the Presidency. It is a privilege which exists to benefit the public, not to benefit a particular public official—past or present. Its purpose is to assure that *the nation* will receive the benefit of honest, untrammeled advice from its officers as rendered to the President. Thus, whether the privilege is claimed by an incumbent or former President does not address the basic purpose for the existence of the privilege. To assert that the privilege shall be interpreted so as to protect incumbent presidents more than former presidents is to inject considerations that are almost completely foreign to the intended purpose of the privilege and ignores the true reason for the existence of the privilege. The true test should be, regardless of who raises it, whether the disclosure of the particular information *at the particular time it is demanded* would be injurious to the public interest considerations that the privilege is designed to protect.

In applying this standard it must be recognized that eventual disclosure of the advice of a Government official, even though the President to whom the advice was given had left office, might be just as injurious in the future to the nation as disclosure during the incumbency of the President who received the advice. Presidents of opposite parties often succeed each other. If the access to confidential advice given to one President is to be subjected substantially to the post-hoc determination of his successor, the assurance of completely competent advice is likely to be lost entirely. The President to whom the advice was given should be in the best position to state whether the expectation of confidentiality enhanced the

advice given to him when he was the incumbent of the office.

Every President inexorably leaves office some time and if every President after he leaves office is to be forced to have his confidential conversations with his trusted advisors treated by some lesser standard than they would while he held office, then every advisor who has a confidential conversation with an incumbent President will always temper his advice by the *eventual* standard that will be applied to its disclosure. The suit will be cut to fit the cloth. Thus, the nation's public interest will suffer by trimmed advice from confidential consultants who no longer can be relied upon to give completely frank advice. Treating confidential advice to presidents by this double standard will operate to substantially depreciate the values that the privilege is designed to protect.

It would be a mistake to place greater emphasis on the privilege on the particular status of any President and that he alone can claim it. Since it is intended to protect the nation, others with a proper interest should be able to enforce it.

Of course, there is no doubt that time somewhat erodes the privilege with respect to some factual situations, but the erosion should not be substantially influenced by the fact that the President who received the advice has left office.

This is not to say that individual privacy claims in some circumstances might not differ between incumbents and former presidents, but such privacy claims are something different from executive privilege.

The Supreme Court has noted probable jurisdiction in the three-judge court ruling in *Nixon v. Administrator*, 408 F. Supp. 321 (D.D.C. 1976), *prob. juris. noted*, 45 U.S.L.W. 3394 (U.S. Nov. 29, 1976). There is thus the

possibility the court might interpret *United States v. Nixon*, 418 U.S. 683 (1974), and its emphasis on the need for presidential conversations in a *criminal* context to constitute a negative implication as to *civil* suits. The pendency of this issue in the Supreme Court is an adequate basis for deferring our decision in this case, particularly because the majority rely thereon for their conclusion. *See* Maj. Op. at 7, 9-10. In such circumstances, in my view it would be preferable if we held our decision in abeyance until the Supreme Court decision is rendered. In the absence of such disposition, to the extent of the foregoing I respectfully dissent from the majority opinion but concur generally in the remainder.

APPENDIX G

CIVIL SUBPOENA

UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

Civil Action 2271-71

HON. RONALD V. DELLUMS, et al.,
Plaintiff,

v.

JAMES M. POWELL, et al.,
Defendant.

To: PHILIP BUCHEN, Counsel to the President
White House, 1600 Pennsylvania Avenue, N.W.,
Washington, D.C.

You Are Hereby Commanded to appear in (the office of MELROD, REDMAN & GARTLAN, 1801 K Street, N.W., Suite 1100K, Washington, D.C. 20006) to give testimony in the above-entitled cause on the 1st day of November, 1974, at 3:00 o'clock P.M. (and bring with you) all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971, at which "May Day" demonstrations (5/3 - 5/7/71) were discussed,

and do not depart without leave.

James F. Davey, Clerk

By: /s/ Robert L. Line
Deputy Clerk

Date: October 24, 1974

Warren K. Kaplan
Attorney for Plaintiffs

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h___ and tendering to h___ the fees for one day's attendance and mileage allowed by law, on the _____ day of _____, 19____, at _____

Dated _____

_____

Subscribed and sworn to before me, a _____
this _____ day of _____
19____

_____

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed March 10, 1976]

Civil Action No. 2271-71

RONALD V. DELLUMS, et al.,

Plaintiff,

v.

JAMES POWELL, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is now before the Court on Richard Nixon's Motion to Quash Subpoena Duces Tecum, and plaintiffs' opposition thereto. This class action grows out of the arrest of approximately 1200 persons on the steps of the U.S. Capitol during the "Mayday Demonstrations" in 1971. Plaintiffs, persons among those so arrested, seek damages for alleged deprivations of various civil rights, claiming that defendants, former high-ranking officials of the federal and municipal governments, conspired to or negligently subjected them to various violations of their statutory and constitutional rights. In October, 1974 plaintiffs issued a subpoena *duces tecum* directing Mr. Philip Buchen, Counsel to the President, to appear and produce "all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971 at which 'May Day' demonstrations (5/3 - 5/7/71) were

discussed." Mr. Buchen filed a motion to quash the subpoena, which was denied on November 14, 1974. Nixon then also filed motions to quash and stay the November 14th order. Because of the pendency of the trial and the prospect that lengthy litigation would be necessary to enforce the subpoena of the tapes, the Court on December 2, 1974 stayed the production order of November 14, 1974. Also on December 2nd the Court severed the trial of defendant John Mitchell, due to his involvement in other judicial proceedings. The trial then proceeded against the other defendants. Early in the trial the Court granted another Nixon motion to quash a subpoena *duces tecum* on Mr. Buchen, seeking to allow a witness in the case, John Dean, access to his own files at the White House to refresh his memory as to the events in question. The Court's granting of that motion to quash was based not on the merits of the matter, but rather on the fact that the trial had already begun and to enforce the subpoena at such a late date would have unacceptably interrupted the proceedings. The subpoena of the Dean files has not been renewed by plaintiffs, and is not now before the Court.

The jury trial of the main part of this case resulted in a substantial verdict for plaintiffs, which is now on appeal. Presently before this Court is the severed case against defendant Mitchell, for which plaintiffs now renew their request for production of the tapes. Nixon continues to request that the subpoena be quashed, contending (a) that discovery of a president's confidential conversations or documents is not permissible in civil litigation; (b) that even if discoverable, there has been no showing of compelling need in this instance to overcome a claim of presidential privilege; and (c) that to permit Mr. Buchen to review the tapes and files to

locate the subpoena material would "countenance an unlawful wholesale invasion of the confidentiality" of the Nixon materials, as well as invade Nixon's personal privacy insofar as the recorded conversations might be with his wife, doctor, friends, attorney, or daughters.

The Court finds none of Nixon's objections persuasive. First, there is no absolute right of "executive privilege" to shield even an incumbent president from judicial process. *United States v. Nixon,* 418 U.S. 683, 706 (1974). In that case the Court explicitly declined to establish the bar to judicial process in civil cases which Nixon now seeks to assert: "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, . . ." 48 U.S. at 712 n. 19. And it appears to this Court that the rationale underlying the refusal of the Supreme Court to find an absolute executive privilege in criminal cases applies with very considerable force to the present civil case. The Court need not pass directly on that issue, however, because in the instant case the privilege is invoked not by the President, but by a former President. What is central to the determination of this motion to quash, therefore, is the strength of plaintiffs' showing of importance of the evidence to their case:

> . . . either a former President may not validly claim executive privilege at all, or if he may do so, his claim is entitled to much less weight than that accorded a claim asserted by an incumbent President. It follows that a claim of privilege by a former President may be overcome by a showing less strong than that needed when the incumbent raises the claim.

Nixon v. Administrator of General Services, C.A. No. 74-1852 (D.D.C., January 7, 1976), at 66-67, n. 50.

The Court in that case, after upholding the constitutionality of The Presidential Recordings And Materials Preservation Act (P.L. 93-526), specifically provided that pending appeal to the Supreme Court the tapes would be available for proper judicial process. *Id.* at slip opinion p. 104.

The Court believes plaintiffs have demonstrated a very strong entitlement to discovery of the tapes in question. Plaintiffs claim that a policy or plan was devised by the defendants in this case, including defendant Mitchell, which led to and instigated the allegedly unlawful arrest and detention of plaintiffs on May 5, 1971. Other discovery has established that high-level meetings were held at the Justice Department to plan for the May Day demonstrations. Defendant Mitchell, according to deposition testimony, was briefed on these meetings. At least one top-level White House aide was present at each of these meetings after April 16, the initial date with which the subpoena is concerned. The almost certain inference must be that these aides reported to Nixon on the progress of their planning, and took his reactions and directions back to the Justice Department. It is quite possible, as plaintiffs suggest, especially given the close relationship between Nixon and Mitchell, that the two men discussed the matter either personally or by telephone. If so, the conversations will be among those subpoenaed. And whatever recorded conversations occurred in the White House with regard to the Administration's plans for dealing with the demonstrators could constitute the most direct and central sort of evidence for plaintiffs' case. The Court can scarcely imagine what could be more relevant to the grave allegations in the present case than the actual words of those alleged to have been the conspirators. Nor can the Court perceive any

alternative means by which plaintiffs could obtain comparable discovery. They have had considerable difficulty, in particular, in arranging to depose Mitchell, and even should they do so the results are bound to be far inferior to the actual contemporaneous record of the planning for the demonstrations. In short, the showing made by plaintiffs completely overcomes whatever presumptive executive privilege may attach to the former President's interest in the tapes.

The Court is not unmindful of the burden imposed on Mr. Buchen by compliance with this order. The plaintiffs, however, have subpoenaed conversations only over that period of time (the twenty-five days from April 16 to May 10) within which it has been established as highly probable that such discussions took place. Review of the tapes for that period will no doubt require some moderate effort of Mr. Buchen and his staff, but that effort is simply a consequence of Mr. Buchen's custodianship of the tapes, and the unique circumstances surrounding that custody. To hold otherwise would mean that there can be in effect no access to the tapes for proper judicial process, contrary to law and court order. The Court believes the present subpoena is drawn as narrowly as it can be without seriously impairing its value to plaintiffs.

Finally, the Court regards Nixon's claims of wholesale invasion of presidential materials by compliance with this subpoena as frivolous. Mr. Buchen is the officer currently charged by law with responsibility for the tapes. This is not the first time he has had occasion to review the tapes and there is not the slightest indication that his discretion cannot be relied upon in his performance of his duties in this matter. His review of the tapes will be limited to a twenty-five day period, and only those portions responsive to plaintiffs'

subpoena will lose their current confidentiality. Further, the fact that he or his staff may overhear conversations between Nixon and his family or the like is a consequence first of the fact that the tapes were made and second of the subsequent circumstances which resulted in their current possession by Mr. Buchen, not a consequence of the continuing administration of justice, of which this subpoena is a part.

It is therefore this 10th day of March, 1976,

ORDERED, that Richard Nixon's Motion To Quash Subpoena Duces Tecum be, and hereby is, denied; and

FURTHER ORDERED, that the December 2, 1974 stay of this Court's November 14, 1974 order be, and hereby is, dissolved; and

FURTHER ORDERED, that Mr. Philip Buchen, Counsel to the President, shall advise the Court within ten days of his estimate of the time required for expeditious compliance with plaintiffs' aforementioned subpoena.

/s/ [illegible]

JUDGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-81

RICHARD NIXON,
Petitioner,

v.

RONALD V. DELLUMS, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I. This case does not warrant a grant of certiorari. The principles underlying petitioner's claim of privilege have already been decided by this Court. The remaining issue is one of specific application in a specific factual context — and that issue will not be framed until the case is remanded to the District Court to carry out the mandate of the Court of Appeals.

In *Nixon v. Administrator of General Services*, ____ U.S. ____, 45 U.S. L.W. 4917 (June 28, 1977) and *United States v. Nixon*, 418 U.S. 683 (1974), this Court held that (1) a president's claim of privilege based upon a general interest

in confidential communications is a qualified privilege; (2) that privilege must yield when its assertion would unduly interfere with the administration of justice or other public interest in disclosure; and (3) the judgment in any particular case requires an evaluation of the encroachment on presidential confidentiality as compared to the importance of the information sought to effect justice in a specific context.

The fact that the question now arises in the context of civil litigation, rather than in a criminal prosecution or as a matter of public historical interest, does not alter the matter or require a new decision by this Court. The privilege is not absolute, and the alleged intrusion must be evaluated and balanced against the need in each case.[1,2]

II. The standards applied by the Court of Appeals in this case in affirming the decision of the District Court were consistent in all respects with the standards utilized by this Court in *Nixon v. Administrator, supra* and *United States v. Nixon, supra.*

---

[1]The privilege has consistently been viewed as merely presumptive and the various courts which have considered the question have balanced the possible detrimental effects of the disclosure against the demonstrated necessity for the information. *Nixon v. Administrator, supra, U.S. v. Nixon, supra* at 708, *Senate Select Committee v. Nixon,* 498 F.2d 727, 730 (D.C. Cir. 1974) (en banc); *Nixon v. Sirica,* 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc); *Committee for Nuclear Responsibility v. Seaborg,* 463 F.2d 788, cert. denied, 404 U.S. 917 (1971); *Sun Oil Co. v. United States,* 514 F.2d 1020 (Ct. Cl. 1975), *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318 (D.D.C. 1966), aff'd 384 F.2d 979, cert. denied, 389 U.S. 952 (1967).

[2]Petitioner's claim that there has and will continue to be a proliferation of civil litigation seeking presidential materials or tapes (Petition at 11) is not well founded. He cites only six cases in addition to the instant case in which litigants have sought such materials. None of the cited cases was filed after 1975. The feared proliferation has not materialized.

In *United States v. Nixon* this Court weighed the importance of the general privilege of confidentiality of Presidential communications against the impact that privilege would have on the fair administration of criminal justice. *Id.* at 711. The Court evaluated the extent to which disclosure would interfere with the President's ability to receive candid advice from his advisors and compared its likelihood and significance to the importance of the due process requirement of production of evidence as to which there was a demonstrated, specific need. *Id.* at 712-713. In *Nixon v. Administrator, supra,* the Court utilized the same methodology in upholding the constitutionality of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107, against a claim of Presidential privilege. Among the interests that the Court said outweighed the claim of privilege was the fact that

> . . . Congress repeatedly referred to the importance of the materials to the judiciary in the event that they shed light upon issues in *civil or criminal litigation,* a social interest that cannot be doubted. *Id.* 45 U.S. L.W. at 4925 (emphasis added).

In this case both the Court of Appeals and the District Court gave Nixon's claim at least the same weight as did the Court in *Nixon v. Administrator.*

Both courts assumed, *arguendo,* that a former President may assert the privilege but gave it less weight because the incumbent was not also asserting it. This is consistent with the treatment accorded to Nixon's claim by this Court in *Nixon v. Administrator, supra,* 45 U.S.L.W. at 4923-4924. The Court there decided what was assumed in this case — that the former President could assert the privilege, but went on to state that the fact that neither subsequent president has supported the claim

detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. *Id.*

Similarly, the analysis in the court below of the weight to be given plaintiff's need for discovery was in accord with the analysis of this Court in *U.S. v. Nixon.*

> . . . [T]here is a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harrassment . . . . the possibility of disclosure in such instances is not unlike the possibility of disclosure in criminal cases — the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled (Court of Appeals Slip Op. at 9, Pet. App. E, p. 17a).[3]

[3]The requisite showing of particularized need for disclosure has been amply demonstrated. The record indicates that the anticipated May Day demonstrations were a matter of considerable presidential attention. At the first trial, plaintiffs introduced minutes of several top-level meetings in the Attorney General's office during the last few weeks prior to the May Day demonstrations which were chaired by Attorney General Mitchell or Deputy Attorney General Kleindienst. The nature and purpose of these meetings was to discuss ways and means of "handling" the anticipated demonstrations. High-ranking presidential aides John Erlichman and John Dean attended most of these meetings and reported to the group President Nixon's concern about possible disruption. At one meeting Mr. Erlichman ". . . stated that the President wanted the city kept open if it took 100,000 [troops]. He added that if we

Thus, since the opinion of the court below presents no departure from existing law and is consistent with this Court's recent decisions in all material respects, this Court need not grant certiorari.

III. Review by this Court of the order of the court below is premature. In *Nixon v. Administrator* this Court approved the legislative scheme of the Presidential Recor-

[3](continued)
were short on troops someone will be in big trouble. He said there was to be no misunderstanding about that and no fine tuning was needed and he said if it turned out to be 'hot air' that would be fine." Minutes of meeting of May 1, 1971, p.9 (Plaintiff's Ex. 12-A). The circumstances giving rise to plaintiffs' need for the tapes, and the critical nature of this evidence to plaintiffs' case was appropriately summarized by the District Court, and expressly affirmed by the Court of Appeals, as follows:

> Other discovery has established that high-level meetings were held at the Justice Department to plan for the May Day demonstrations. Defendant Mitchell, according to deposition testimony, was briefed on these meetings. At least one top-level White House aide was present at each of these meetings after April 16, the initial date with which the subpoena is concerned. The almost certain inference must be that these aides reported to Nixon on the progress of their planning, and took his reactions and directions back to the Justice Department. It is quite possible, as plaintiffs suggest, especially given the close relationship between Nixon and Mitchell, that the two men discussed the matter either personally or by telephone. If so, the conversations will be among those subpoenaed. And whatever recorded conversations occurred in the White House with regard to the Administration's plans for dealing with the demonstrators could constitute the most direct and central sort of evidence for plaintiffs' case. The Court can scarcely imagine what could be more relevant to the grave allegations in the present case than the actual words of those alleged to have been the conspirators. Nor can the Court perceive any alternative means by which plaintiffs could obtain comparable discovery. App. E, p. 20(a)

dings and Materials Preservation Act, 44 U.S.C. §1207, which required professional Government archivists to screen, *inter alia*, all of the tape recordings of presidential conversations. Since the recordings which are the subject of this litigation are among those subject to that screening, Petitioner's interest in preventing that review has already been adjudicated by this Court.

In its original, January 28, 1977 opinion, the Court of Appeals directed the District Court to appoint a professional Government archivist initially to review the tapes to identify, and submit to the Court, those portions relevant to this litigation. Nixon's right to be present during the review and his right to assert any rights, defenses or privileges prior to transmission of the materials to plaintiffs was recognized by the court. (App. E, p. 24a-25a). On April 14, 1977, the Court of Appeals modified this provision, at petitioners' insistence, to make the appointment of an archivist permissive rather than mandatory in the District Court. (Pet. App. C, p. 6a). However, in light of this Court's subsequent decision in *Nixon v. Administrator*, it is likely the District Court will appoint an archivist to perform the initial screening and review.

In the event that the archivists' review produces relevant conversations, petitioners may then assert any claims of privilege in a specific factual context. To the extent that material relevant to plaintiffs' claim is found, it may be that petitioner will not object at that stage to the disclosure. Adjudication of issues of privilege should properly await a specific factual context which will allow the issues to be more precisely developed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. In opposing the petition for certiorari in this case, respondents erroneously state that ". . . the Court of Appeals and the District Court gave Nixon's claim [of presidential privilege] at least the same weight as did the Court in *Nixon v. Administrator.*" Brief in Opposition, p. 3. Respondents arrive at this faulty conclusion by relying on their out of context reference to this Court's statement in *Nixon v. Administrator* which explained that Mr. Nixon's contention that the Presidential Recordings and

Materials Preservation Act intrudes upon the independence of the Executive Branch was undercut by the fact that President Ford signed the legislation and the Solicitor General under President Carter vigorously supported its constitutionality. *Nixon v. Administrator, et al.*, ____ U.S. ____, 45 U.S.L.W. 4917 (June 28, 1977). This Court did not hold – as respondents would have its opinion interpreted – that a former President's assertion of the privilege is automatically entitled to lesser weight. To the contrary, as we noted in our petition, this Court expressly adopted the position set forth in the Solicitor General's brief which stated that the vitality of the confidentiality privilege must be measured in decades and is not dependent upon whether the person asserting it happens to be the current or a former Chief Executive. The Court of Appeals' "automatic lesser-weight" analysis is contrary to this Court's later treatment of the issue and should not be permitted to stand uncorrected in view of the numerous cases pending in various district and appellate courts which will likely adopt the Court of Appeals' erroneous approach if certiorari is not granted.

2. Respondents contend that Supreme Court review at this juncture is premature because a search of the 25 days of presidential conversations has not taken place *and* if after a search any conversations are found that are relevant to the respondents' demands, petitioner can reassert his objections to production of the recordings. Respondents miss the point. In *United States v. Nixon,* 418 U.S. 683 (1974), this Court concluded that a President's need for confidential discussions with his advisers warrants a presumptive privilege against demands for disclosure. To overcome that presumption the Special Prosecutor was required to demonstrate preliminarily a compelling need for the material *and* to particularize his request. Here, in the context of a much less compelling showing of need

arising in the context of civil litigation, the Court of Appeals has condoned an exhaustive review of twenty-five days of presidential conversations; a review that will entail intrusions into the confidentiality of innumerable matters wholly irrelevant to respondents' demands. Conceding that the respondents have not established that relevant conversations even occurred, the Court of Appeals concluded that it was sufficient for respondents to show that "it is highly likely that such conversations did take place" (Pet. App. E, p. 21a). This standard of particularization cannot be reconciled with the requirements established by this Court in *United States v. Nixon, supra.* Moreover, respondents fail to address the question of whether the constitutionally-based privilege of confidentiality designed to foster the free-flow of presidential communications should be deemed merely presumptive in the context of a civil litigant's desire for disclosure of Oval Office deliberations, and if so, whether the presumption should be stronger than in the context of demands for evidence in criminal cases. Those issues clearly warrant this Court's consideration in view of the pending suits referred to in our petition.

For the foregoing reasons, and those stated in our original petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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